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No. 94-661

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

W.R. Grace & Co.-Conn.,

Petitioner,

v.

Maryland Casualty Company, Royal Indemnity Company,
Aetna Casualty & Surety Company and
Continental Casualty Company,

Respondents.

On the Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Petitioner W.R. Grace & Co.-Conn.'s Response to Maryland Casualty Company's Motion to Strike Petitioner's Reply Brief

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W.R. Grace & Co.-Conn ("Grace") files this response to the motion brought by Respondent Maryland Casualty Company ("Maryland") to strike Grace's Reply Brief. Grace filed its reply brief pursuant to Rule 15.6 of this Court to address a jurisdictional argument first raised in the brief in opposition filed by Maryland, that Grace's petition for certiorari was filed out-of-time. Grace, in its reply brief, detailed the procedural history and the import of the two rehearing petitions that Grace

filed with the Second Circuit which demonstrate that its petition for certiorari was timely filed with this Court. In a final and desperate attempt to draw this Court's attention away from the merits of Grace's petition, Maryland again ignores and mischaracterizes the procedural history of this matter, focusing this time on routine correspondence between Grace and the Clerks of this Court and the Second Circuit which merely confirmed the Second Circuit's treatment and disposition of Grace's petitions for rehearing and the resulting deadline for filing its petition for certiorari with this Court.

Maryland's motion continues to misrepresent the procedural history of this matter that is reflected in the Second Circuit's docket entries included in the appendix to Grace's reply brief. (RA1-RA4). Contrary to Maryland's argument (Motion, pp. 2 & 3), Grace did not cause the Second Circuit Clerk to "recharacterize" Grace's petition for rehearing in order to enlarge the time in which to file a certiorari petition with this Court. The docket entries indicate that on June 13, 1994, the Second Circuit Clerk, *sua sponte*, filed Grace's pleading as a "petition for rehearing, petition for rehearing in banc." (RA2). On July 15, 1994, the Second Circuit denied both of Grace's requests for relief. (RA4). The letters by Grace's counsel to the Clerks of this Court and the Second Circuit dated July 26 and July 27, 1994, respectively (RA9-11), simply confirm the fact that the Second Circuit, *itself*, had earlier "re-characterized" Grace's petition,

that the relief sought in the petition had been denied on July 15, 1994, and that the 90-day period for filing a petition for certiorari would therefore begin to run from July 15, 1994. (*Id.*)

The letters merely confirm the status of the procedural posture of the case as reflected in the Second Circuit's docket entries. Contrary to Maryland's arguments, the correspondence with the Court Clerks was not a "sharp practice" designed to improperly "obtain an enlargement of time." (Motion, p. 3, ¶¶ 4 & 5). Grace's time for filing its petition for certiorari with this Court was not dictated by Grace's correspondence. Rather, that time deadline was triggered by the Second Circuit's Order of July 15, 1994. Had either of the Court Clerks interpreted the procedural history in the manner suggested by Maryland, then Grace would have filed its petition no later than August 15, 1994. The fact of the matter is that the docket entries accurately reflect the treatment and disposition of Grace's petition. Grace's correspondence with the Court Clerks did not impact either the Second Circuit's disposition of Grace's petition for rehearing or the timing in which to bring its certiorari petition before this Court. Maryland, therefore, was not prejudiced in any way by not receiving contemporaneous copies of Grace's confirming correspondence.

This Court should not countenance Maryland's procedural maneuvering to avoid or detract from a disposition of Grace's petition on the merits. For all the reasons set forth above, Grace

respectfully requests that this Court deny Maryland's motion to strike Grace's reply brief.

Respectfully submitted,



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